Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMES B. BEARD, Petitioner,

v.

TOGO WEST, SECRETARY OF THE ARMY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES B. BEARD
6501 Shoal Creek Road
Fort Worth, TX 76132-4418
(817) 346-4511
Pro Se Petitioner

93pp

QUESTIONS PRESENTED

1. Whether the Government materially breached the contract by its failure to timely transcribe radiology reports and file same in patients' medical records, by its failure to provide administrative and ancilliary support for use in the performance of this contract, and by ordering Petitioner to read/interpret Magnetic Resonance Imaging studies without the requisite background information or medical histories?

2. Whether the Government's breach of contract preceded the alleged default by Petitioner?

3. Whether the Government used the improper procedure for termination of Petitioner?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, James B. Beard, and the Respondent, Togo West, Secretary of the Army.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

****

JAMES B. BEARD, Petitioner,

v.

TOGO WEST, SECRETARY OF THE ARMY,

Respondent

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

****

The petitioner, James B. Beard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on October 14, 1993.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit for Case No. 93-1405 was entered without opinion on October 14, 1993.

The decision of the Armed Services Board of Contract Appeals for Appeals Nos. 42677 and 42678 was entered on March 30, 1993.

JURISDICTION

The Petitioner appealed William Beaumont Army Medical Center's Contracting Officer's Termination for Default to the Armed Services Board of Contract Appeals which upheld the Contracting Officer's decision on March 30, 1993.

The Petitioner appealed the Armed Services Board of Contract Appeals' decision to the United States Court of Appeals for the Federal Circuit which upheld the Board's decision. The judgment without opinion was entered on October 14, 1993.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Federal Circuit is pursuant to Title 28, United States Code Annotated, Section 2101 et.seq.

STATEMENT OF THE CASE

On November 1, 1989, the United States Army/Government and Petitioner/ Contractor, James B. Beard, D.O., Radiologist, entered into contract No. DADA09-90-C-0006, which required Petitioner to provide professional diagnostic services in the Radiology

Department at William Beaumont Army Medical Center (hereinafter WBAMC) located in El Paso, Texas. The services were to be provided in accordance with the precepts of the American College of Radiology (hereinafter ACR) and radiology service standards of the Joint Commission for the Accreditation of Hospitals Manual (hereinafter JCAH) (R4 tab 1, p. C-1 C.2.1; TR 22).

The contract incorporates by reference approved standards which Petitioner and the Government agreed to follow. References included in the contract are the JCAH 1988 Regulations of the ACR (R4 tab 1, p.C-12 C.12.2 and p.C-1 C.2.1).

The referenced JCAH Regulations require that radiology reports, as per Petitioner's job description (R4 tab 1,

C.2.1 and C.6.1.1), are to be completed promptly, so they may then be transcribed and filed in the patient's record "within 24 hours of completion, if possible" (R4 Supp. tab 47, MR.2.2.13 and MR.2.2.13.1).

The ACR regulations require that the interpretation for all radiographic (imaging) procedures be performed in a timely fashion and include a mandatory written report to confirm and verify the interpretation and serve as a legal and medical document for future use. (R4 Supp. tab 46, I-B-1; TR 84).

WBAMC Quality Assurance Regulations require that all activiities at WBAMC are to fulfill the requirements of, inter alia, the JCAH and the ACR (R4 Supp. tab 45, WBAMC Reg. 40-66-1).

At the time of Petitioner's termination, transcriptions of dictated

Radiology reports were not occurring within twenty-four (24) hours or in a timely fashion as required by ACR and JCAH (R4 Supp. tab 46, I-B-1 and tab 47, MR.2.2.13 and MR.2.2.13.1). The backlog of transcriptions was weeks and months for some reports (TR 192). In fact, the transcription backlog of dictated Radiology reports had increased from eighty-three (83) to one hundred-forty (140) bundles, and was noted as a JCAH violation in the official Radiology Department Quality Assurance Meeting Minutes of 6 February 1991 (R4 tab 41 Supp. and TR. 114). Thus, despite Petitioner's timely reading and dictation of medical reports, the Government failed to cause the reports to be transcribed and entered into patients' permanent medical records for

weeks and months. This was a clear violation of the contract and the referenced regulations of the ACR and J^AH that resulted in the quality of patient care being jeopardized (R4 Supp. tab 41, p.5).

Petitioner's contract specifies that the Government will provide administrative and ancillary support for use in performance of Petitioner's contract (R4 tab 1, p.C-11 C.11.2). However, despite the Govenment's contractual obligation, it failed to provide Petitioner and the Radiology Department with adequate ancillary staff. Petitioner repeatedly made requests for additional transcriptionists and on several occasions, offered to pay for his own ancillary staff so as to be in compliance with the prescribed medical regulations to which both parties agreed (TR 32-33). The Government refused to

allow Petitioner to hire ancillary help at his own expense, but did nothing to rectify the situation. Again the Government was in breach of contract.

Another problem at WBAMC was that Radiologists were asked to read studies without required background information or medical histories of the patients. For example, it was not unusual for Petitioner to be assigned a dozen or more Medical Resonance Imaging (MRI) studies in one day (TR 200). However, when Petitioner was suddenly ordered to read/interpret the MRI studies without background information of prior studies or patient medical histories, under the auspices of a new hospital policy (TR. 169) the Government again breached Petitioner's contract. Such

clinical information is absolutely necessary to read MRI studies and it is a violation of JCAH regulations to attempt to read studies without it (R4 Supp. tab 35). Shortly before termination of the contract in February, 1991, when the Petitioner was ordered to follow this new policy, he correctly regarded this to be, in his professional medical judgment, an unacceptable practice of medicine and sought relief, but to not avail. The Government clearly breached the contract by ordering Petitioner to perform professional diagnostic radiology services that were not of a nature and scope described in the contract in accordance with the precepts of the American College of Radiology, and radiology services standards of the JCAH (C.2.1).

On Thursday afternoon, 7 February 1991,

after working four and one-half hours, Petitioner became ill and received permission from the department chairman to go home for the rest of the afternoon and all day Friday. During this time, Petitioner contacted his malpractice insurance carrier's risk management specialist and described the delay in typing the Radiology reports. The risk management specialist discussed the additional malpractice risk exposure of this serious patient care issue with the Petitioner. The Petitioner contacted the Chief Contracting Officer who stated he would arrange a meeting between himself, the chairman of the Radiology Department, and the Petitioner to sit down and resolve this problem.

The Petitioner returned to the Radiology Department and WBAMC on 11, 12,

13, and 15 February 1991 and performed productive work for the hours listed in his log book on those days. During this week of 11 to 15 February 1991, Petitioner attempted to meet with WBAMC's Radiology Department representatives as they had suggested, but they withdrew their promise to discuss the serious patient care issue and would not meet with Petitioner. On 13 February 1991, Petitioner delivered a letter to WBAMC's Contracting Office requesting written notification of the Government's ability or inability to comply with his contract's conditions relative to the timely reporting of his dictations to the attending physicians. (Appendix D)

On 15 February 1991 the Government terminated Petitioner's contract for default for five days of unexcused absence. Petitioner appealed the termination to the Armed

Services Board of Contract Appeals requesting payment of the balance due of the contract because the Government breached the contract, and used the wrong method of termination (FAR 52.249-0008 (a)(2). A hearing was held on January 30, 1992, and the decision was entered on March 30, 1993, with the ASBCA upholding the WBAMC's Contracting Officer's decision.

The ASBCA's decision was appealed to the United States Court of Appeals for the Federal Circuit, and judgment without opinion was entered on October 14, 1993.

REASONS FOR GRANTING THE WRIT

I.

The Government materially breached the Contract.

The Government's failure to timely transcribe radiology reports and file same in patients' medical records was a clear

violation of the contract and the referenced regulations of the ACR and JCAH. Furthermore, Administrative Law Judge Schepers stated in her Findings of Fact on Page 6, paragraph 8, "Appellant requested clarification whether Clause C.6.1.14 required him to distribute his reports after he gave them to the typist, and was assured the hospital was responsible for the distribution of his reports." (Emphasis Added)

Thus it is an absolute untruth for the Government to state in the Appellee's Informal Brief that the "Army had no contractual obligation to transcribe reports within a specified period of time", that "transcription was not a requirement; rather, it was an option available under the contract", and that the "Army did not breach the contract".

The Petitioner logically insists that the Government failed to comply with explicit provisions of the contract dealing with transcription and such failure constituted a material breach of contract by the Government.

The Government's failure to provide administrative and ancillary support for use in the performance of this contract was a clear breach of the contract. Major William David Marsh, the Chief Contracting Officer at WBAMC (hereinafter Chief CO), testified that the ancillary support mentioned in section C.11.2 of Petitioner's contract called for the Government to provide, inter alia, transcriptionists, radiology technicians, secretarial/receptionist support and medical records or x-ray film filing staff. (TR 79-80).

However, despite the Government's contractual obligation, it failed to provide Petitioner and the Radiology Department with adequate ancillary staff. The Government would not allow Petitioner to hire ancillary help, and did nothing to rectify the situation. The Government attempted to excuse its noncompliance as merely being "inefficient". In addition, the Government claimed that the lack of support staff was "out of its control" or that the requests of Petitioner were "extra-contractual", instead of recognizing that the Government was in breach of contract.

The Government clearly breached the contract by ordering Petitioner to read/interpret MRI studies without the requisite background information or medical

histories. The contract did not allow the Government to order Petitioner to perform professional diagnostic radiology services that were not of a nature and scope described in the contract in accordance with the precepts of the American College of Radiology and radiology services standards of the JCAH (C.2.1). The contract further states that the Government would retain no control over the professional aspects of the services rendered by the Petitioner, including his professional medical judgments (C.6.1.3).

II.

The Government's breach of contract preceded the alleged default by Petitioner.

The Government first claimed the termination for default was due to Petitioner's five unexcused absences from

work in violation of contract Clause C.5.2. However, Petitioner's official log book was entered into the record and it clearly shows that Petitioner performed his professional duties on the days in question. The contract specifically states that Petitioner shall only be paid for productive work. Accordingly, Petitioner offered into the record a U. S. Treasury pay check designating the full payment for productive work performed on the days in question. Hence, the Government's contention that Petitioner violated any absence provisions under the contract is without merit. In any event, the five days in question were after the various breaches of the contract by the Government as listed above.

The Government later asserts that Petitioner was in default because of anticipatory repudiation. The evidence

is clear that Petitioner repeatedly requested that the Government make the changes described above so as to keep its end of the contractual bargain and not hinder Petitioner from performing his professional radiological services in accordance with the contract and the appurtenant medical regulations.

Petitioner proceeded diligently while urging the Government to meet its contractual obligations such as timely transcriptions of reports. However, the duty to proceed is not absolute. Whited Company, Inc., VABCA-1604, 84-3 BCA Para. 17,654. Petitioner would have had a right to avoid his duty, due to the Government's aforementioned breaches of contract. Petitioner was being forced to practice substandard medical techniques due to the Government's apathy toward

complying with the contract. The record indicates that Petitioner stated over and over again that the Government's actions and/or omissions constituted a breach of contract and that in his professional medical judgment, Governmental compliance was an absolute necessity so as to insure quality patient care. Nonetheless, Petitioner never manifested a positive unequivocal and unconditional intent not to perform his obligations under the contract. In fact, as the record reflects, Petitioner stated he would not cease performance if the Government improved the backlog problem or at least attempted to alleviate the situation by holding a meeting with Petitioner and the Chief of the Radiology Department at WBAMC. (TR 238). In other words, Petitioner would not have abandoned the contract if only

the Government would have cured its breaches (TR 249). Futhermore, Petitioner finds it peculiar that the Government claims it was positive about Petitioner's anticipatory repudiation when Dr. Woisard, who was in charge of making out the work schedules for the Department of Radiology, scheduled Petitioner work assignments up until the day the notice of termination was served and for the weekend after Petitioner was terminated (TR 109). Also, Sue Anderson, WBAMC Contracting Officer, who prepared the notice of termination, stated at the hearing that she was not aware that the Petitioner was in the medical facility, except her office, during the time that she used for the termination basis. She was not aware until the hearing that the Petitioner was present doing

professional radiology work during the days that were counted against the Petitioner as unexcused absences (TR 48-49). Clearly, Petitioner did not abandon his work and did not anticipatorily repudiate his contract. But, assuming just for the sake of argument, that Petitioner's words or actions were interpreted as anticipatory repudiation, his conduct was preceded by the Government's aforesaid breaches. Thus, the Government breached the contract first and Petitioner has an immediate right to pursue money damages for the balance of the contract.

III.

The Government used the improper procedure for termination of Petitioner.

The following findings of Administrative Law Judge Schepers are of great importance to show that according to

custom and the contract, the Government used the incorrect method of terminating Petitioner as Judge Schepers stated in her decision. Nine months prior to Petitioner's termination he was given a cure notice which threatened a default termination if Petitioner did not cease talking to patients in the hallways outside the treatment rooms. Petitioner considered his conduct to be appropriate "bedside manner". After receiving the cure notice, he advised the commanding general that he would not change what he considered acceptable medical practice and did not appear at work the next morning. After one-half day, the commanding general requested by telephone that Petitioner return to work and stated that the chairman of the department "will never harass you again about

talking to patients". Petitioner returned to work, and the cure notice was rescinded because it was inappropriate to interfere with Petitioner's medical judgment. This evidence is crucial to the procedure used to terminate Petitioner nine months later.

The Government terminated Petitioner for default but failed to provide him with a cure notice or give him an opportunity to be heard as was customary and as the contract provided and as promised. The contract, which references Termination for Default, FAR 52.249-0008 (a)(2) is clear,

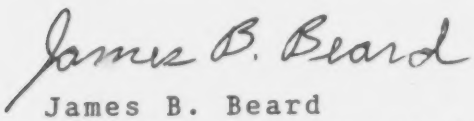
> . . . The Government's right to terminate this contract under [for default] may be exercised if the Contractor does not cure such failure within 10 days . . . after receipt of the cure notice from the Contracting Officer specifying the failure.

Because Petitioner was not given a cure notice prior to termination, any termination by the Government must be for Convenience and not for Default. This fatal error renders the termination improper.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioner's previously filed post-hearing briefs, Petitioner prays that this Court order that the Termination for Default be converted to one for Convenience of the Government, and that Petitioner be awarded breach damages in the amount of $158,205.10, plus all expenses, and for any such further relief that this Court may find just and proper.

Respectfully submitted,



James B. Beard
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Fort Worth, TX 76132-4418
(817) 346-4511
Pro Se Petitioner

APPENDIX A

REPORTED
United States Court of Appeals for the Federal Circuit

NOTICE OF ENTRY OF
JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: October 14, 1993

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

3a

FRANCIS X. GINDHART

Clerk

cc: JAMES B. BEARD

GERALD M. ALEXANDER

BEARD V ARMY, 93-1405

(BCA AS - 42677 & 42678)

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The dispositon will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

93-1405

JAMES B. BEARD, D.O.,

Appellant,

v.

John Shannon,

ACTING SECRETARY OF ARMY,

Appellee.

Judgment

ON APPEAL from the BOARD OF CONTRACT APPEALS

in CASE NO(S). 42677 and 42678

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (NIES, Chief Judge, CLEVENGER and SCHALL, Circuit Judges):

ARRIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED Oct. 14 1993

/s/Francis X. Gindhart
Francis X. Gindhart, Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
OCT 14 1993
FRANCIS X. GINDHART
CLERK

APPENDIX B

REPORTED

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
James B. Beard, D.O.	)	ASBCA Nos.
	)	
Under Contract No.	)	42677 and
	)	
DADA09-90-C-0006	)	42678

APPEARANCE(S) FOR THE APPELLANT:

James B. Beard, D.O.

APPEARANCE(S) FOR THE GOVERNMENT:

COL Riggs L. Wilks, Jr., JA

Chief Trial Attorney

MAJ Samuel J. Rob, JA

Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

These timely appeals are from two contracting officer's decisions: (1) terminating for default appellant's contract to provide radiology services; and (2) denying appellant's demand, based

on the Government's alleged breach of contract, for $158,205.10, the balance alleged to be due for the remainder of the option year of his contract. Appellant, while appearing pro se, was accompanied at trial by his daughter, a law school graduate, and received assistance from his son-in-law, a practicing attorney. The parties' detailed briefs were of assistance in the preparation of these decisions. We deny both appeals and thus uphold the default termination.

FINDINGS OF FACT

1. On 1 November 1989, appellant was awarded a fixed price contract in the amount of $245,854.00 to provide non-personal radiology services to the William Beaumont Army Medical Center (WBAMC), El Paso, Texas, for the period

2 November 1989 to 30 September 1990 (the contract). Clause I.57 provided for a one-year option period.

2. The contract included standard clauses FAR 52.249-2: Termination for Convenience of the Government (Fixed-Price) (Apr 84) and FAR 52.249-8: Default (Fixed-Price Supply and Service) (Apr 84) the latter of which provides:

> (a)(1) The Government may . . . by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract

(but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

* * *

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if termination had been issued for the convenience of the Government.

3. The contract also included the clause at FAR 52.233-1: Disputes (Aug 89) which required appellant to proceed with contract performance pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the contracting officer.

4. Other contract provisions include the following:

C.2 GENERAL

C.2.1 The Contractor shall provide professional diagnostic radiology services of a nature and scope described herein in accordance with the precepts of the American College of Radiology, and radiology services standards of the Joint Commission for Accreditation of Hospital (JCAH) Manual. Services shall be performed at WBAMC. Radiologists

are expected to complete a scheduled workload each day not to exceed a 40-hour work week, not including on-call requirements. Assignments of daily procedures for the week will be made no later than the Friday proceeding (sic) the next work week (Technical Exhibits 2 and 3).

C.2.2 Contractor employees will share equally with departmental members in all professional activities of the department to include rotations with the members of the department for emergency night and weekend on-call coverage (Technical Exhibits 2 and 3).

C.2.3 The Contractor shall provide all specified radiologists to fulfill the contract requirements on a full time basis during the contract performance period.

* * *

C.5 ABSENCES

C.5.1 Each day that services are performed the Contractor shall be required to sign-in his/her time of arrival and departure on a log sheet to be maintained at the receiving desk in the Department of Radiology. The Contractor shall furnish the COR at the end of each month a list of employees who worked during that period.

C.5.2 Two weeks of leave and one week for professional training at no expense to the Government will be allowed during the twelve-month contract period, however, the periods of absence must be agreed to and approved by the COR. Twelve (12) unexcused absences a year shall be allowed, but no period shall exceed 5 work days within a given month and not to exceed 12 workdays during the annual contract period.

* * *

C.6.1.2 Provide diagnostic consultation and treatment related to diagnostic imaging to the members of the medical staff. Participate as appropriate in both the hospital and departmental quality assurance programs (Technical Exhibit 4).

C.6.1.3 The professional services rendered by the contractor and his employees are rendered in its capacity as an independent contractor. While this Performance of Work Statement (PWS) contains provisions that allow the Government to evaluate the quality of medical care provided, to credential the Contractor and/or the contractor's employees, and for certain other administrative requirements, the Government retains no control or supervision over

the professional aspects of the services rendered by the contractor and the Contractor's employees, including by example its professional medical judgments, diagnosis, or specified medical treatments.

C.6.1.4 The Contractor shall be solely liable for any liability producing act or omission by it or its employees or agents and shall indemnify or hold harmless the Government against all liability producing acts or omission by it, its employees, or its agents.

C.6.1.5 The Contractor shall maintain professional liability insurance as specified in Section I, Paragraph I.57 which coverage shall apply to the services rendered under this contract.

C.6.1.13 The Contractor shall perform and provide diagnostic interpretation of Radiologic examinations and special

procedures performed by Government technicians. The Contractor Radiologists shall submit legible handwritten or dictated reports of the interpretation on Standard Form (SF) 519B or the Hospital Information System (HIS) (C.7).

C.6.1.14 Shall verify the content and correctness of all prepared and transcribed reports by affixing his/her own signature and stamp to all copies of the document and validating its contents the same day as documents are provided by the Government.

* * *

C.7 RESPONSE TIME

* * *

C.7.2 Films, except those covered by paragraph C.7.3 (fluoroscopy exams and special procedures), shall be read

and reported per C.6.1.13 within twenty-four (24) hours after receipt by the Department of Radiology.

* * *

C.11 GOVERNMENT FURNISHED FACILITIES AND SUPPLIES AND SERVICES

* * *

C.11.2 The Government will provide administrative and ancillary support for use only in the performance of this contract.

5. Clause F.7 of the contract required appellant to report ready for work at 7:30 a.m. Monday through Friday. The standard duty hours for appellant were 7:30 a.m. to 4:30 p.m. each day.

6. JCAH Standard MR.2.2.13.1 states that "[Radiology] reports are [to be] completed promptly and are filed in the [patient's medical] record within 24 hours of completion, if possible."

7. The Policies of Clinical Standards of Patient Care and Professional Credentialing Criteria adopted by the Council of the American College of Radiology include under "Mandatory Written Reports for All Radiologic Procedures":

> The interpretation for all radiologic (imaging) procedures will be performed in a timely fashion and include a written report to confirm and verify the interpretation and serve as a legal and medical document for future use.

8. For approximately two years prior to this contract, appellant had another contract to perform radiology services at WBAMC. In response to the solicitation issued for this contract,

appellant submitted with his bid the following requested word change to the solicitation:

> Clause C.6.1.14: Add this sentence at the end. The transcribed reports shall be provided by the Government to the Contractor for signature within one government working day after dictation by the Contractor. (See C.2.1 standards of JCAH manual)

On 22 September 1989, the contracting officer wrote appellant that the language of Clause C.6.1.14 was nonnegotiable and that due to the size of the Department of Radiology (Department), the large work-load, and the uncertainty of sick leave for the transcribers, a one-day turnaround on transciption of reports could not be guaranteed. On 26 September 1989, appellant requested the following be added to Clause C.6.1.14:

> The responsibility of the Radiologist should be to interpret the radiological study, and the responsibility of the Radiology Department and the MTF shall be conveying the report to the referring clinician within 24 hours from the completion of the study, in order to effect timely and effective patient management.

On 29 September 1989, a negotiation meeting was held to discuss appellant's proposal. Appellant requested clarification whether Clause C.6.1.14 required him to distribute his reports after he gave them to the typist, and was assured the hospital was responsible for the distribution of his reports. With that clarification, appellant rescinded his request to change or add to the language of Clause C.6.1.14.

9. Contract Modification No. P00010 extended appellant's contract through 30 September 1991 at a contract price of $256,488. All other terms and conditions remained unchanged.

10. On 6 February 1991 the Department held a quality assurance meeting attended by, among others, appellant, COL (Dr.) LeGrand (Chief of the Department), and MAJ (Dr.) Woisard (Chief of Diagnostic Services with responsibility for the day-to-day running of the Department). Topics discussed included the backlog of dictated reports of radiology procedures waiting to be transcribed. The overall backlog which was at its height the previous October and November, had decreased and was further decreasing due to the Department's efforts. Priority had been given to

inpatient reports which were being transcribed within twenty-four hours after dictation. But as a result of the shift in emphasis, the backlog of outpatient reports awaiting transcription had increased and the turn-around time was four to six weeks. Proposals to increase equipment and personnel to remedy the situation were discussed.

11. Dr. Woisard's minutes of the 6 February meeting referred to the transcription backlog as a "Risk issue and JCAHO [Joint Commission for Accrediation for Health Organizations] violation." At hearing Dr. Woisard stated he probably should not have put JCAHO violation in the memorandum, because the Department was doing the best its resources would allow. Although the Department did not meet Dr. Woisard's understanding of the

intent of JCAHO, to get as close to twenty-four hours as possible, it did meet the intent of the JCAHO standards. Further, in December 1991 JCAHO reviewed the Department's data for the preceding year, including Dr. Woisard's minutes of the 6 February meeting, and "passed" the Department with no Category One findings. A Category One finding identifies a deficiency that has a significant impact on patient care.

12. To provide reports earlier to the attending physicians, the radiologists could: (a) hand-write the report; or (2) telephone the information to the attending physician. It was the Department's policy to use the second option when there was a significant finding that might alter the patient's care, and a reasonable possibility that the attending physician was unaware of the finding.

13. Following a discussion with Dr. Woisard on 7 February, appellant told Dr. LeGrand that he was ill and permission was granted for appellant to leave; appellant's absences after 7 February were unexcused. Appellant was not put on the rotation for the scheduled Department duties either 8 or 11 February, but was assigned duties 12 through 15 February. On Monday, 11 February, appellant advised representatives of the Department that he would not be working the following two days and should not be put on the rotation schedule. Thus appellant was again omitted from the rotation for scheduled Department duties from 12 through 15 February. Members of the Department were particularly uncertain when appellant would return because two earlier times appellant did not report for work. During

his contracts at WBAMC appellant had complained of inadequate office size and access to telephones, and refused to perform work assignments which he considered could be performed more efficiently by secretaries or other support staff.

14. On either 12 or 13 February, appellant visited the ultrasoundmography section of the Department, said goodbye, and stated to the technologist that "[t]hings were working out for the best."

15. On 13 February appellant hand-delivered a letter to the contracting officer which stated in part:

> I am requesting written notification from the Contracting Office and the Radiology Department of their ability or inability to comply with my contract conditions relative to timely reporting of my

dictations to the attending physicians.

16. On 13 and 14 February appellant met with MAJ. Marsh, chief of the contracting office, who understood appellant to state he would not return to work unless the turn-around time for transcribing routine reports was corrected. MAJ. Marsh stated the problem could not be immediately resolved and reminded appellant that he could either verbally transmit the information or provide a handwritten report. MAJ. Marsh unsuccessfully attempted to arrange a meeting with appellant, Dr. LeGrand, and MAJ. Marsh. The contracting officer and Dr. Strand, chairman of the Department, also understood appellant to state during this time period that appellant was dissatisfied

with the situation in the Department, particularly the delay in transcription of the radiology reports, and would not return to work until the problems were corrected. Appellant's abjections were shared by others in the Department, but Dr. Woisard felt appellant was not sufficiently cooperative in resolving the issues.

17. Between 11 and 13 February, appellant returned to the Department and, along with meeting with colleagues, read and signed radiology reports. Signing reports was not a scheduled duty and not considered part of the defined workload of the Department, although these tasks were part of the Department's "productive work." Appellant's log book reflects the following entries:

11 February 7:40 am to 11:30 am

12 February 9:10 am to 10:05 am

13 February 10:43 am to 11:05 am

and 11:34 am to 12:25 am

14 February None entered

15 February 7:20 am to 8:40 am

18. At trial appellant described his entries as times when he was reading and signing radiology reports, tasks he considered "meaningful radiology work." In his deposition, appellant described these entries as:

> Those were returns to the hospitals in attempts at resolving the problem of not working where I talked to Maj. Marsh in Maj. Marsh's office, the contracting office, and talked with Col. Stephenson, General Proctor.

19. Appellant was paid $ 5,638.40 for all or a portion of the above time;

the Government later demanded return of the amount, alleging it was paid in error. This amount is not part of either appeal.

20. The contracting officer or MAJ. Marsh received reports from Drs. LeGrand and Woisard that appellant was not in the area and did not perform his duties under the contract. By no later than the meeting with MAJ. Marsh on 13 February, appellant knew of the Department's efforts to remedy the transcription back-log through obtaining more equipment and personnel.

21. On 15 February 1991 the contract was terminated for default premised on the determination that appellant had unexcused absences for five work days during the month of February, in violation of Clause C.5.2.

22. During his direct testimony appellant described the above occurrences as follows:

A. Appellant preferred military to private practice because the power and profit motives were not present in military practice. Appellant found WBAMC "the best medicine in the United States in terms of a military hospital" and appellant went to WBAMC because "it's the best and [appellant] watched doctors practice good medicine."

B. In September, 1990, appellant asked Dr. Strand if she were going to take the chairmanship of the Department, because if the position were filled by Dr. Woisard, appellant did not want to continue during the option period. Even though Dr. Strand did accept the chairmanship, appellant felt she "turned over

total control" of the Department to Dr. Woisard.

C. Appellant stated his major concern about the Department was the time required for typing radiology reports. Since transcription was delayed, the attending physicians would, in violation of Department rules, take the film from the file room and read the film or attempt to get a radiologist to do so, albeit the reading was incomplete and unofficial. In early 1991 the typists' office space was needed for an additional radiologist and the typists were moved to another building about a mile from the Department. Appellant felt that particularly during the move, the quality of secretarial service was further degraded. Appellant stated his second major problem with the Department was Dr. Woisard's

announcement at the 6 February 1991 meeting that on the following Monday every doctor's office would be searched for films, both properly checked out and improperly taken. Beginning 11 February, films could be obtained only through certain procedures which, in appellant's view, would result in requiring an additional 30 minutes of the primary care physician's time when films were checked out.

D. Two weeks prior to the 6 February meeting, reading of magnetic resonance imaging (MRI) studies was moved from the civilian radiologists "downtown" to the radiologists at WBAMC. Appellant felt the radiologists at WBAMC were already overworked and did not need the additional task. On 7 February appellant received his first MRI studies,

a total of 14 which is a full day's work, with almost no accompanying clinical history. The MRI is the most sophisticated study done in radiology, and, without clinical information to focus the search, a radiologist could spend hours deciphering the information. Appellant stated to Dr. Woisard that despite the fact the military radiologist read MRIs without background information, appellant refused to do so on the basis that (1) he was not a military radiologist and (2) Dr. Woisard could not require appellant to do something against his medical judgment. Dr. Woisard told appellant that he should obtain the patients' folders with the background information himself, since there were no secretaries available to do so. Appellant "refused to be a secretary to go hunt up all that background

information." Appellant, compensated on an hourly basis, felt taxpayer's money should not be spent in that fashion. Dr. Woisard asked if appellant felt Dr. Woisard was not being fair; appellant answered "since [Dr. Woisard] brought it up," appellant felt Dr. Woisard had not been fair to appellant on the rotation of duties. After this discussion, appellant had "reached my limit." The conversation resulted in appellant's having a headache, nausea, and difficulty thinking. Thus, appellant reported to Dr. LeGrand that he was ill and could not work that day, 7 February, and probably not the following day.

E. That afternoon appellant called his medical malpractice insurer and advised of the delay in transcription of

the outpatient radiology reports. Appellant understood the malpractice insurer to state that while they could not legally cancel appellant's insurance, they felt the situation appellant described was a serious problem. Appellant determined that if the Department was not willing to work on the problems set out in finding 22, his malpractice risk was too great to continue working at WBAMC. On Friday, 8 February, appellant reported by telephone call to MAJ. Marsh the content of his calls with his malpractice insurer. Appellant understood MAJ. Marsh to suggest that appellant's concerns could be discussed at a meeting among MAJ. Marsh, appellant, and Dr. LeGrand on either Friday or Monday, 8 or 11 February.

F. That weekend appellant called the Department and advised that he would not

be able to work on the following Monday, 11 February. Appellant was not ill on Monday, but rather waited at home for notice of the meeting. On Tuesday appellant was told by MAJ. Marsh that there would be no meeting, and that appellant would be default terminated if he did not resume his duties. Appellant objected, stating that his malpractice carrier "asked me to sit down and discuss it." Appellant demanded the meeting to try and resolve the problems. Appellant then prepared the letter which he delivered Wednesday, 13 February. Appellant waited for a response to his letter, such as an assurance appellant would be assigned only tasks that did not put him at medical legal risk. On Thursday appellant again called the Department and requested a written answer to his letter.

He was told that he would not receive one and would be default terminated on Friday unless he returned to work. Appellant stated that he could not be terminated on a verbal notice, and was told the Department interpreted his contract differently. On Friday, 15 February, appellant received his notice of termination for default. Despite warnings, appellant "could not believe" the Department would default terminate rather than terminate for convenience, absent a ten-day cure notice and discussion of these problems.

G. Nine months earlier, appellant was given a cure notice which threatened a default termination if he did not cease interviewing patients in the hallways outside the treatment room. Appellant explained the situation to the commanding general and then went home, stating that

he would not change what he considered to be an acceptable practice. After one-half a day, the commanding general requested by telephone that appellant return to work and stated that "Dr. Griffith [former chairman of the Department] will never harass you again about talking to patients." Appellant returned to work and heard nothing more about talking to patients. "My livelihood was rescued by intervention of the commanding general of the hospital." Based in part on the occurrences surrounding the cure notice, appellant felt that there was a concerted effort to "get rid" of him, first by Dr. Griffith and then by Dr. Woisard. Appellant had had an earlier dispute with Dr. Woisard because Dr. Woisard made changes in appellant's contract when the option

period was exercised and requested appellant sign the contract with only a four-hour review time. Certain of the disputed changes, none of which were ultimately made part of the contract, concerned primarily the manner in which appellant would share the work of the Department and whether appellant would work over forty hours per week.

23. The affidavit of Ms. Margie J. Stockert, the insurance representative with whom appellant spoke states in its five substantive paragraphs:

> 1. Dr. James B. Beard, D.O. contacted me on or about 13 February 1991 regarding the effect of transcription of radiology report delays on his malpractice insurance.
>
> 2. I have no recollection of having advised Dr. Beard to withdraw from

his contract with William Beaumont Army Medical Center or to stop working or otherwise cease contract performance at the William Beaumont Army Medical Center.

3. I have no recollection of having advised Dr. Beard that the delays in transcription created an unacceptable malpractice risk. I did, however, advise him of the additional exposure created by the delays.

4. On 13 February 1991 I wrote a letter to Dr. Beard, at his request addressing the concerns over the delay in transcriptions.

5. Dr. Beard's medical malpractice insurance with the Professional Medical Insurance Company has not been cancelled nor has [sic] his insurance rates been increased as a

result of Dr. Beard's complaints concerning delays in transcriptions at the William Beaumont Army Medical Center.

24. In describing the 11 through 14 February time period, appellant stated "my limit was reached," he "missed a day of work" on 11 February, it was not easy to "quit my job," he had "had enough," and his discussion with Dr. Woisard on 7 February was the "last straw." Appellant states: "It is Appellant's position that it was futile to continue performance under the present conditons until Appellant was afforded an opportunity to meet with the Government to discuss resolving the backlog problem." (app. br. at 16). Based on findings 22 and 23, the entire record, and observing the demeanor and personality types of the witnesses, we

find appellant communicated to the contracting officer and other Government representatives, in a positive , definite, unconditional and unequivocal manner, an intent not to continue performance of the contract in accordance with its terms, absent certain actions which the Government either could not or had no contractual obligation to fulfill. Further on the same basis, we find that neither the outpatient transcription backlog nor any possible malpractice liability was the chief motivating factor in appellant's abandonment of the contract.

25. There is no evidence of any patient injury for any reason and specifically due to the circumstances discussed in these appeals. There is no evidence within this record that appellant's professional competence was

lacking in any respect. Rather, Dr. Woisard stated appellant was "a very competent radiologist."

26. On 22 February 1991 appellant submitted a claim to the contracting officer alleging breach of contract by the Government and demanding compensation of $158,205.10, the balance of his contract amount. On 5 March 1991 the contracting officer denied this claim, stating that appellant breached his contract by his failure to report to work after five unexcused absences in one month, and further that appellant "repudiated your contract by stating on several occasions that you were not returning to work."

DECISION

Appellant states that the issue is quality of patient care. While we share

and support appellant's concern for patient care, appellant is in error. Pursuant to the contract terms, the issue brought to us in both appeals is whether either party breached the contract and if so, when and in what respect. The legal analyses of the appeals are intertwined, thus we will discuss the two appeals in one decision.

The default termination stated it was based on unexcused absences for more than five work days in one month. At trial the Government stated that the default was also justified by appellant's repudiation of the contract, an assertion within the contracting officer's decision denying appellant's claim alleging Government breach of contract. A contracting officer's termination decision may be sustained on other than

the stated grounds as long as the alternate grounds existed at the time of the termination. Joseph Morton Company, Inc. v. United States, 757 F.2d 1273, 1277 (Fed. Cir. 1985). At no time did appellant object on any basis to the Government's second ground for justifying the default.

The Government has the burden of proving the default termination was justified. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). Once the Government established the propriety of the termination for default, the burden shifts to appellant to rebut the Government's case or show its default was due to causes beyond its control and without its fault or negligence. E.g., Mary Lou Fashions, ASBCA No. 29318, 86-3 BCA ¶ 19,161, aff'd,

824 F.2d 979 (table) (Fed. Cir. 1987).

Appellant contests the termination for default by asserting: (1) he did not have five unexcused absences in February; (2) he received no cure notice prior to default; and (3) he did not abandon performance of the contract.

It is undisputed that: (1) appellant was not excused from Departmental duties 8 through 14 February; and (2) based upon appellant's statements and actions, appellant was not included in the work rotation 8 through 15 February. By clauses C.2.1, C.2.2, C.2.3, C.7.2, and F.7 of the contract, appellant was to complete a scheduled workload during an eight-hour day not to exceed a forty-hour week, and share equally in all professional activities of the Department, including rotation for emergency nights

and weekends. Inasmuch as appellant did "log-in" and sign radiology reports during a portion of some days the week of 11 February, he argues he was not absent those days. In view of the Government's alternate termination ground, we do not have to decide the propriety of the default termination on the issue of absence.

To establish anticipatory breach, the Government has the burden of proving appellant communicated an intent not to perform in a positive, definite, unconditional and unequivocal manner. United States v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991). There must have been (1) a definite and unequivocal statement by the contractor that he refused to perform or (2) actions which constitute actual abandonment of performance. Professional Building Services and Maintenance, ASBCA

No. 42480, 91-3 BCA ¶ 24,360 and cases cited. Refusal to proceed unless the Government fulfills certain demands outside those specified in the contract is considered abandonment of the contract and entitles the Government to summarily terminate for default. Brenner Metal Products Corporation, ASBCA No. 25294, 82-1 BCA ¶15,462. As stated in our findings, the Government carried its burden of proving that appellant abandoned the contract (finding 24).

The contractor has the burden to prove its abandonment was excusable within the meaning of the Default clause or was caused by the Government's material breach of the contract. F & D Construction Co., Inc. and D & D Management, Consulting and Construction

Co., Inc., ASBCA Nos. 41441-44, 91-2 BCA ¶23,983 and cases cited. Under the Disputes clause, the contractor, regardless of disputes with the Government, is obligated to continue performance, and cessation of work is grounds for default. Max M. Stoeckert v. United States, 183 Ct. Cl. 152, 391 F.2d 639 (1968). A cure notice is not required for the contractor's repudiation of the contract. Beeston, Inc. ASBCA No. 38969, 91-3 BCA ¶24,241. The termination for default was justified on the basis of appellant's abandonment or anticipatory repudiation of the contract.

Appellant contends his default was excusable and appellant is entitled to breach damages due to the following alleged Government breaches of contract: (1) interference with appellant's ability

to provide quality services in accordance with medical standards, in violation of C.6.1.4; (2) failure to provide adequate support staff in violation of C.11.2; (3) failure to transcribe and file radiology reports in patient files within twenty-four hours of the procedure in violation of JCAH standards; (4) requiring appellant to read MRI's without background information or medical histories in violation of JCAH regulations; and (5) interference with appellant's professional medical judgment which was supported by ACR and JCAH in violation of C.6.1.3.

The first three allegations are based on two erroneous premises: (1) the Government had a contractural obligation to appellant to have radiology reports typed within twenty-four

hours of transcription; and (2) failure to meet this obligation resulted in potential liability for appellant. Clause C.11.2 limits to the performance of contract work appellant's utilization of Government support staff. The negotiation prior to execution of the contract should have disabused appellant of this feared liability.

Regarding allegation four, appellant's direct testimony made clear that appellant was required only to obtain the background information without secretarial help prior to reading the MRI's. We appreciate the concern appellant, who was compensated on an hourly basis, had for the manner in which the tax dollar is spent. But this concern is insufficient to excuse appellant's abandonment of the contract.

In allegation five appellant seemingly reargues points one through four. Clause

C.6.1.3 which provides the Government will have no control or supervision of the medical judgments, diagnosis, or specified medical tretments, did not give appellant the right to re-draft provisions of the contract.

This record does not show a breach of contract by the Government. There is no allegation or indication that appellant has not been paid for services rendered. Under the contract that is all appellant is entitled to. In the absence of a Government breach, no payment is due for services not performed.

Accordingly, we deny both appeals and uphold the default termination.

Dated: 26 March 1993

/s/ Jean Schepers
JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

/s/William J. Ruberry
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman,
Armed Services Board
of Contract Appeals

I concur

/s/V. John Riismandel
V. JOHN RIISMANDEL
Administrative Judge
Vice Chairman, Armed
Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 42677 and 42678, Appeals of James B. Beard, D.O., rendered in conformance with the Board's Charter.

Dated: 31 MAR 1993

/s/ Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX C

DEPARTMENT OF THE ARMY

ACQUISITION ACTIVITY

CONTRACTING OFFICE

WILLIAM BEAUMONT ARMY MEDICAL CENTER

EL PASO, TEXAS 79920-5001

5 March 1991

Contracting Officer Certified Mail

Return Receipt

SUBJECT: Termination for Default of

Contract DADA09-90-C-0006

James O. Beard, D.O.

5000 Alabama Street, Apt. 6

El Paso, TX 79930

Dear Dr. Beard:

This is a final decision regarding your claim dated 20 February 1991, requesting payment of a penalty and separation compensation in the amount of $158,205.10. Your claim is denied in total.

Your contract was terminated for default due to your failure to perform services within the time specified in the contract (see FAR 49.402-1). Your failure to return to duty on February 15, 1991, after unexcusably absenting yourself from your contracted duties on 7 February 1991, breached the terms of your contract (paragraph C.5.2). You were authorized five consecutive days of unexcused absence, you exceeded this period on February 15th. During the days preceding your failure to perform, you repudiated your contract by stating on several occasions that you were not returning to work. In addition you were notified by myself, as well as Major William Marsh and Mr. Al Caton, that failure to return to work would result in a termination for default.

The government did not breach the terms of your contract as alleged in your letter of 13 February 1991. The government had no contractual obligation to return reports to you within any specified time period. While this may be an issue of concern to you, your failure to address your concerns in writing to the medical centers' quality assurance committee, as suggested by Major Marsh and Mr. Caton, does not support your position that you have been exposed to unacceptable malpractice liability. Therefore, I have determined that under the default clause, FAR 52.249-8, your failure to perform was not beyond your control and was not without your fault or negligence.

You will be paid for any work performed under the contract. The contract does not provide for payment of a penalty

or separation conpensation and FAR 49.402-2 (a) prohibits payment for undelivered work. Therefore, no payment, other than for work performed, will be made.

This is my final decision as the contracting officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to me. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court within 12 months of the date you

received this desision.

Sincerely,

/s/Sue Anderson

Sue Anderson

Contracting Officer

/s/Joyce M. Beard 5/March/1991 9:38 am
RECEIPT ACKNOWLEDGED 5 MARCH 1991

APPENDIX D

TO: Maj. Dave Marsh, Sue Anderson and
Al Caton
WBAMC Contracting Office

FROM: James B. Beard, Radiologist

DATE: 13 February 1991

This is to notify you about the problems concerning my Contract No. DADA09-90-C-0006. I have discussed these with Maj. Marsh on several occasions starting on the afternoon of Thursday, 7 February 1991, with the most recent duscussion of yesterday, Tuesday, 12 February 1991. My position is that my contract has been violated resulting in unacceptable malpractice risk to me. This risk assessment necessitated my immediate withdrawal from further risk exposure. The problem was previously addressed during my contract negotiations in October, 1989, with

me receiving assurances that the report risk problems would be solved. They have not been solved; they are worse.

I have discussed these problems with my malpractice carrier, and their risk management department representative, Ms. Margie Stockard, of PMIC, (816) 523-1835 or (800) 821-3515. She stated that she would be glad to talk to any of you concerning the astronomical risk exposure created by this situation. She is concerned about the risk to both myself and WBAMC.

I talked with Maj. Marsh at 1016 hours yesterday. He indicated that the Radiology Department was sympathetic to these problems, but felt it could not fix them in any reasonable time frame.

I am requesting written notification from the Contracting Office and the

Radiology Department of their ability or inability to comply with my contract conditions relative to timely reporting of my dictations to the attending physicians.

Receipt Acknowledged: /s/Sue Anderson

Date: 13 Feb 91 Time: 10:45

APPENDIX E

TO: Sue Anderson, Al Caton, and Maj. Dave Marsh
WBAMC Contracting Office

FROM: James B. Beard, D.O., Radiologist

DATE: 20 February 1991

In reference to your 15 February 1991 Modification to Contract No. DADA09-90-C-006, I take exception and offense to the statement "e" that blatantly states without justification that I left my job without any reason. My contract has been violated by the United States Government as stated in my letter which was received and signed for by the Contracting Office at 10:45 on 13 February 1991.

I am requesting compensation to the full extent of the unpaid contract agreement as a penalty and separation compensation while I seek new gainful

employment. Attached you will find four copies of my invoice in the amount of $158,205.10.

I expect expeditious resolution of this dispute as per FAR 52.249-8 (c) and and (g) and 52.233.1.

Certification

I, James B. Beard, D.O., hereby certify that (i) This claim is made in good faith; (ii) that the supporting data are accurate and complete to the best of my knowledge and belief; and (iii) the amount requested accurately reflects the contract adjustment for which I believe the Government is liable.

/s/James B. Beard, D.O.
(Signature)

Receipt Acknowledged: /s/Sue Anderson

Date: 20 Feb 91 Time: 3:40 pm